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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF FLORIDA

EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER FILED FEBRUARY 19, 1974, AND BRIEF IN SUPPORT OF EXCEPTIONS

ROBERT H. BORK,
Solicitor General,
WALLACE H. JOHNSON,
Assistant Attorney General,
KEITH A. JONES,
Assistant to the Solicitor General,
BRUCE C. RASHKOW,
MICHAEL W. REED,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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EXCEPTIONS

The United States takes exception to two determinations by the Special Master that certain waters previously treated by the United States in the conduct of its foreign affairs as territorial seas or international waters are instead inland waters within the coastline of the State of Florida:

1. The United States excepts to the Special Master's conclusion (Report, p. 57) that "[t]he waters between the mainland and the upper Florida Keys which lie east of a straight line drawn between the East Cape of Cape Sable and Knight Key * * * constitute inland waters of the State of Florida," and to the findings on which that conclusion is based.

2. The United States further excepts to the Special Master's finding (Report, pp. 52–53) that the narrow waters within each of three groups of islands—the lower Florida Keys from Money Key to Key West, the Marquesas Keys, and the Dry Tortugas Islands—are inland waters of the State of Florida.

STATEMENT

This case involves the rights of the State of Florida in the sea and seabed adjacent to its coasts. It is a continuation of the tidelands litigation falling within the original jurisdiction of this Court; a brief review of that litigation may therefore be helpful.

In *United States* v. *California,* 332 U.S. 19 (*California I*), this Court held that the United States, and not the several States, has full dominion over the resources of the seabed of the territorial sea. This principle was reaffirmed by the Court in *United States* v. *Louisiana,* 339 U.S. 699 (*Louisiana I*), and *United States* v. *Texas,* 339 U.S. 707.

Shortly thereafter, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.,* granting all coastal States ownership of the resources of the seabed within three geographical miles of their coasts, and further granting the coastal States along the Gulf of Mexico such ownership within their historic offshore boundaries, if any, out to a maximum of three marine leagues in the Gulf. It was then determined, in *United States* v. *Louisiana,* 363 U.S. 1 (*Louisiana II*), and *United States* v. *Florida,* 363 U.S. 121, that Texas and Florida, but not the other Gulf coastal States, possessed historic offshore boundaries extending more

than three geographical miles into the Gulf. The cause (No. 10, Original, subsequently renumbered as No. 9, Original) was retained "to determine the coastline, fix the boundary and dispose of all other relevant matters." *United States* v. *Florida, supra,* 363 U.S. at 129. The particular issues remaining between Florida and the United States were the location of the line dividing the Atlantic Ocean from the Gulf of Mexico, the determination of Florida's coastline, and the fixing of its historic boundary in the Gulf.

Subsequently, the United States instituted a new proceeding (No. 35, Original) against all thirteen Atlantic coast States, including Florida, to determine the respective rights of the United States and those States to the resources of the seabed adjacent to them in the Atlantic Ocean. Florida's claims in that proceeding were different from those of the other Atlantic coast States, and it moved that the case against it be severed.

At this point, the United States and Florida jointly moved for consolidation of the issues between them, involving both the Gulf of Mexico and the Atlantic Ocean, into a single, separate proceeding. This Court granted the joint motions, ordered Florida severed from the other States in No. 9, Original and No. 35, Original, consolidated the Florida proceedings into this action (No. 52, Original), and appointed a Special Master. 403 U.S. 949, 950.

Several interrelated issues were before the Special Master:

(1) Florida's principal contention was that congressional approval of its 1868 constitution constituted an express or implied grant of all natural resources of the seabed within its historic offshore boundary in both the Atlantic Ocean and the Gulf of Mexico, and that the State is therefore entitled to those resources without regard to the three-mile and three-league limits of the Submerged Lands Act. The Special Master rejected that contention and determined (Report, pp. 8–11, 56) that the State is entitled only to the rights specifically granted by the Act.

(2) The parties disagreed as to the location of the line dividing the Atlantic Ocean from the Gulf of Mexico, and the Special Master determined (Report, pp. 18–21, 56) the location of that line in the manner contended for by the United States.

(3) The parties disagreed as to the location of that segment of the State's historic boundary in the Gulf of Mexico running northeastwardly from the Dry Tortugas Islands toward the mainland. Florida contended that the boundary was marked by a straight line running due northeast from the Dry Tortugas, encompassing "a very large roughly semicircular area of comparatively deep water" (Report, p. 26); the United States contended that the boundary followed along connected segments of straight lines, five-fathom curves, and three-fathom curves, running generally northeastwardly in shallow waters within three marine leagues of the coastline of the outlying islands. The respective contentions are set forth on the chart opposite page 84 of the Report. The Special Master rejected both contentions and fixed (Report, pp. 24–31) the historic boundary as running along a line three marine leagues seaward of the coastline.

(4) Florida contended that the waters generally circumscribed by the mainland, the islands running out from the mainland all the way to the Dry Tortugas, and a line running due northeast from the Dry Tortugas back to the mainland, constituted an historic bay which comprised inland waters of the State. The United States contended that none of that area of water satisfied the requirements of an historic bay. The Special Master rejected Florida's broad contention but nevertheless determined (Report, pp. 36–47, 57) that the portion of that area lying east of a straight line drawn between Knight Key and East Cape (see the chart opposite page 84 of the Report) constitutes a juridical bay, which he denominated "Florida Bay," and that the waters within that bay are inland waters of the State.

(5) Under the Submerged Lands Act, the coastline of a State is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(c). The Special Master's determination that the waters of Florida Bay are inland waters required his further determination (Report, pp. 47–55) that the coastline surrounds the Bay by means of closing lines running southwestwardly from the mainland through the

upper Florida Keys to Knight Key, and across the mouth of the Bay from Knight Key to East Cape. The coastline was not otherwise in dispute between the parties, who understood that it would be defined elsewhere by natural shorelines. But the Special Master determined *sua sponte* that as to each of three groups of outlying islands—the lower Florida Keys from Money Key to Key West, the Marquesas Keys, and the Dry Tortugas—"the narrow waters within the group are inland waters of the State of Florida and the coastline follows the ordinary low-water line along those portions of the coast of the outer islands and low-tide elevations of the group which are in direct contact with the open sea and straight lines drawn between those islands and low-tide elevations" (Report, pp. 52–53).

(6) The Special Master concluded (Report, pp. 57–59) that Florida is entitled, as against the United States, to the seabed and all the natural resources of the seabed and the sea within three geographical miles of its coastline in the Atlantic Ocean and three marine leagues of its coastline in the Gulf of Mexico, and that the United States is entitled, as against Florida, to the seabed and all the natural resources of the seabed and sea of the outlying continental shelf.

The United States excepts only to the Special Master's determinations that the Florida Bay and the narrow waters of the three groups of outlying islands constitute inland waters of the State.

ARGUMENT

I

FLORIDA BAY IS NOT A JURIDICAL BAY

1. The determination whether Florida Bay is a juridical bay constituting inland waters of the State of Florida has little importance to the final determination of the respective seabed rights of the United States and the State under the Submerged Lands Act. Measuring the State's historic boundary from the Bay's closing lines as designated by the Special Master, rather than from the natural shorelines of the mainland and upper Florida Keys, affects little more than ten square miles of seabed in an area having no known mineral resources.[1] But the juridical status of the Bay has a larger international significance which is unrelated to the Act.

In the conduct of its foreign affairs, the United States treats the waters of Florida Bay as territorial seas or international waters. The United States presently claims a three-mile territorial sea, measured from the mainland islands, and certain low-tide elevations along the Bay. The extent of that claim is shown on the chart opposite page 94 of the Report.

[1] Moreover, even if the existence of a juridical bay is assumed the Special Master erred in measuring the historic boundary from the present closing line; the historic rather than present closing line should have been used for that purpose; and the historic closing line, if any, was too far east to affect the historic boundary. See pp. 14–15, *infra*.

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Similar maps have in the past been distributed to foreign governments in order to indicate to them the extent of our territorial sea (Report, p. 42). Approval of the Special Master's determination of the existence of a juridical bay would extend the United States' claim into waters previously treated as high seas, and it would imply adoption by the United States of a principle permitting one side of a bay to be formed by a chain of islands. These results would be contrary to the foreign policy of the United States, which has consistently been to discourage coastal states from extending their jurisdiction into areas previously regarded as high seas. See, *e.g.*, 4 Whiteman, *Digest of International Law* 88–91 (1965).

The 24-mile closing line proposed by the Special Master would enclose waters through which foreign vessels have historically possessed the right of innocent passage. The determination that those waters are inland waters, subject to the exclusive dominion of the coastal nation, cuts off that right.[2] Foreign vessels passing through the keys east of Knight Key would henceforth do so only at the sufferance of the coastal State. Although the shallow waters in the Bay are not readily navigable by large ships, smaller vessels would be affected, and a precedent would be set which other nations might use to shut off passage through island chains near their coasts. Also, by extending both the territorial sea and the nine-mile

[2] For an enumeration of the rights possessed within the territorial sea, see Articles 14–23 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606.

contiguous zone into areas previously considered high seas, the Special Master's determination would sharply curtail the rights of foreign vessels: foreign vessels, which had previously operated in those seas without any interference by the United States, would become subject to American customs, immigration, pollution, and fisheries laws and, within the extended areas of territorial sea, would be deprived of all high seas rights.

In short, the Special Master's determination threatens many international maritime rights in both the Bay and the outlying waters.

2. The Act grants seabed rights extending "from the coast line" of the coastal State, and, as we have previously indicated, "coast line" is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(b), (c). This Court, in *United States* v. *California* (*California II*), 381 U.S. 139, further determined that the meaning of "inland waters," as used in the Act, conforms to its meaning in the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606. And the parties here stipulated that the determination of the Florida coastline "shall be governed by pertinent articles of the Convention * * *" (Report, p. 69).

Article 7 of the Convention, which is set forth at pages 37–38 of the Report, describes a juridical bay as a "well-marked indentation" containing "landlocked waters." We believe that the Special Master erred in

determining that Florida Bay is a juridical bay within the meaning of that Article.[3]

In the *Louisiana Boundary Case*, 394 U.S. 11, this Court distinguished between Article 7 bays, which are formed by indentations in a mainland coast, and bodies of water lying between the mainland and fringes or chains of islands lying off the coast. The Court there expressly sustained the position of the United States that "island chains can be taken into account as enclosing inland waters only by drawing straight baselines [and that] the decision whether to draw such baselines is within the sole discretion of the Federal Government." 394 U.S. at 67. The Court "concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland." *Ibid.* Accordingly, a body of water bounded on one side by the mainland and on the other side by a chain of islands, and not formed by any substantial indentation in the mainland, cannot be a juridical bay under Article 7 unless the islands are "so closely aligned with the mainland as to be deemed a part of it." 394 U.S. at 67, n. 88.

[3] Moreover, even if the Special Master was correct in determining the existence of a juridical bay, he erred in drawing the closing line between Knight Key and the East Cape of Cape Sable. That line has a distance of 24.55 geographic miles and therefore exceeds the maximum closing line of twenty-four miles permitted by Article 7. See *Louisiana Boundary Case*, 394 U.S. 11, 48–50, n. 64. However, if the finding of a juridical bay is sustained, a closing line of proper length could be drawn from East Cape to Vaca Key.

Florida Bay does not meet the tests set forth in the *Louisiana Boundary Case*. The Bay is not formed by any substantial indentation in the mainland; it is simply a body of water lying between the mainland and the upper Florida Keys. And the upper Florida Keys cannot realistically be considered part of the mainland. There are substantial water barriers between several of the keys: gaps of approximately one mile or more separate Teatable Key from Indian Key, Lower Matecumbe Key from Greyhound Key, and Long Key from the Conch Keys. See the chart opposite page 94 of the Report. Moreover, there are at least two navigation channels—between Teatable and Indian Keys, and Lower Matecumbe and Greyhound Keys—through the upper Florida Keys. *Ibid.;* and see the the chart opposite page 84 of the Report. It is the view of the United States that the channels and water gaps west of Teatable Key preclude any finding that the keys further west are "so closely aligned with the mainland as to be deemed a part of it." Certainly there is no basis for such a finding with respect to the outermost of the upper Keys, Knight Key, which is separated from the mainland by several water gaps and channels.

The Special Master did, however, make a general finding to that effect. His reasoning is not set forth in detail in his Report, but he apparently relied (Report, p. 39) on an earlier portion of the *Louisiana Boundary Case* opinion (394 U.S. at 60–66) which dealt with the circumstances in which islands may be treated as headlands of bays. That discussion, how-

ever, concerned only bays which are formed by substantial indentations into the mainland coast but additionally have a "natural entrance point" or headland located on an island.[4] That discussion, of course, does not apply to cases, such as this, where there is no substantial indentation in the mainland coast. The question here is not whether the headland of a bay may be located on an island, but rather whether a juridical bay may be formed by a fringe of islands projecting out from a generally flat or convex mainland. The answer given to that legal question by this Court in the past—that a juridical bay may be so formed only when the islands may realistically be deemed part of the mainland—requires reversal of the Special Master's determination here.

[4] Even in discussing the use of islands merely as headlands, the Court recognized that islands could only rarely be treated as forming any portion of the coast of a juridical bay (394 U.S. at 62–63): "Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. But much of the Louisiana coast does not fit the usual mold. It is marshy, insubstantial, riddled with canals and other waterways, and in places consists of numerous small clumps of land which are entirely surrounded by water and therefore technically islands." (Emphasis in original; footnotes omitted.)

Thus the Court there permitted the use of islands as headlands only because of the peculiar nature of the Louisiana coast, where islands and mainland are to a large degree indistinguishable as a practical matter. The Special Master gave no similar reasons to justify his far more extensive use of islands as the major defining coastline of a juridical bay.

3. After concluding that Florida Bay is a juridical bay, the Special Master further observed that "the character of this area as inland waters of the State of Florida appears to be conceded by the United States" (Report, p. 39). The United States intended no such concession and believes that it made none. Florida's principal claim with respect to those waters had been that they were a portion of a larger historic bay,[5] and the United States argued extensively in its post-trial brief (pp. 78–109) that there are no historic bays along the coast of Florida. We did not argue the question of juridical bays in that brief, for Florida at trial had seemingly abandoned its original alternative claim of an Article 7 juridical bay. But we had presented evidence at trial which was intended to refute that alternative claim. See Tr. 145–146.

Moreover, our position with respect to the necessary defining characteristics of a juridical bay has been consistently maintained throughout the tidelands litigation in this Court. A bay formed between the mainland coast and a fringe of islands projecting away from that coast can be designated a juridical bay under Article 7 only if either (a) the United States has determined to connect the islands with the mainland by means of straight baselines or (b) the islands are, as a practical matter, largely indistinguishable from the mainland. See *California II, supra,* 381 U.S.

[5] Such bays have been described by this Court as "bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *California II, supra,* 381 U.S. at 172.

at 167–172; *Louisiana Boundary Case, supra,* 394 U.S. at 66–73.

4. But even if it is assumed *arguendo* that Florida Bay satisfies the Article 7 definition of a juridical bay, the Special Master erred in measuring Florida's historic offshore boundary from the 24-mile closing line which he designated for the Bay. Historic boundaries measured from the coastline must be measured from the historic coastline. *United States* v. *Louisiana,* 389 U.S. 155 (*Louisiana III*). At the time Florida's 1868 constitution was adopted, the United States recognized closing lines of no more than two marine leagues. See *Manchester* v. *Massachusetts,* 139 U.S. 240, 258. After a comprehensive review of the history of the subject, the Special Master in the *California II* case concluded that even as late as 1947 "the United States had taken the position that a bay was inland water only if a closing line could be drawn across its mouth less than 10 miles long * * *." 381 U.S. at 163. The longer 24-mile closing line is a creature of the Convention on the Territorial Sea and the Contiguous Zone and was adopted by the United States only upon its ratification of the Convention on March 24, 1961.

Thus even if, contrary to our contention, a juridical bay can be formed out of the upper Florida Keys, its maximum closing line for the purpose of fixing Florida's historic boundary would be two marine leagues in length. Such a closing line would, of course, be considerably to the east of the closing line drawn by the Special Master. Indeed, such a closing line, or even a longer closing line ten miles in length, would

be east of many of the small islands in the Bay and therefore would not affect Florida's historic boundary at all; that boundary would be measured three leagues out from the natural shorelines of those islands rather than from the closing line. Moreover, since the boundary so drawn would at all points lie at least three geographical miles beyond the 24-mile closing line designated by the Special Master, that longer closing line would not be in any way relevant to a determination of Florida's seabed rights under the Submerged Lands Act.[6] In other words, the question whether Florida Bay constitutes a juridical bay should have no bearing on the ultimate disposition of the seabed rights at issue in this case although, for the reasons previously stated (pp. 7–9, *supra*), the question is important because of its international ramifications.

II

ISLAND ARCHIPELAGOS MAY NOT BE ENCLOSED BY CLOSING LINES

1. The Special Master *sua sponte* used closing lines to enclose the narrow waters of each of three island groups—the lower Florida Keys from Money Key to

[6] Florida is granted seabed rights within its historic boundary in the Gulf out to a maximum of three leagues, but is guaranteed a minimum of three miles from its current coastline. 43 U.S.C. 1301(b); *United States* v. *Florida, supra.* Where the historic boundary lies more than three miles seaward of the current coastline, the three mile minimum alternative need not be invoked.

Key West, the Marquesas Keys, and the Dry Tortugas Islands. The use of such closing lines has little or no effect on the disposition of seabed rights in this case; there is no substantial difference between Florida's seabed rights as determined by the Special Master, using closing lines as the coastline, and those which would be determined using natural shorelines. However, as in the case of the Special Master's enclosure of Florida Bay, the enclosure of the waters within each of the three outer island groups has such important international ramifications that the United States is constrained to except to the Special Master's finding.

The United States has heretofore treated the narrow waters within these three island groups as territorial seas through which foreign vessels may engage in innocent passage without restriction or interference. By encircling each island group with closing lines, the Special Master converted these territorial seas into inland waters, thus terminating the right of innocent passage. This of course threatens direct interference with foreign navigation and is contrary to the foreign policy position of the United States.

2. The Special Master's finding cannot be justified under the Convention on the Territorial Sea and the Contiguous Zone. Since the narrow waters within these island groups are neither bays nor rivers, their enclosure by use of closing lines would be permitted under the Convention only if they satisfy the requirements for the use of straight baselines. But Article 4 of the Convention allows the use of straight baselines

only "[i]n localities where the coast line is deeply indented and cut into, or if there is a fringe of islands in its immediate vicinity" and specifies that "[t]he drawing of such baselines must not depart to any appreciable extent from the general direction of the coast * * *." See Report, p. 48. The islands here in question—the lower Florida Keys, the Marquesas, and the Dry Tortugas—do not meet these criteria.

Article 4 contemplates the enclosure of inland waters lying between an island chain and the mainland coast, not of waters lying within a group of islands. Moreover, the islands here at issue are not in any event in the immediate vicinity of the mainland; instead, they extend away from the mainland, separating the Atlantic Ocean from the Gulf of Mexico, with the most seaward group, the Dry Tortugas, lying almost 100 miles from the mainland. Furthermore, the closing lines proposed by the Special Master would not follow the general direction of the coast at all; they would completely encircle each of the three island groups without regard to the direction of the mainland coastline.[7]

Moreover, even if these island groups otherwise satisfied the requirements of Article 4, it was not

[7] Finally, whereas Article 4(3) prohibits the construction of straight baselines "to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them" (see Report, p. 48), the Special Master has proposed lines among the "outer islands and low-tide elevations of the group * * *" (Report, p. 53). Nautical charts of these islands show that there are numerous low-tide elevations among them which do not have permanent installations above sea level.

within the jurisdiction of the Special Master to create inland waters through the construction of straight baselines. As in the *Louisiana Boundary Case, supra,* 394 U.S. at 67, "the decision whether to draw such baselines is within the sole discretion of the Federal Government, and the United States has not chosen to do so." And, as this Court further observed in the *Louisiana Boundary Case, supra,* 394 U.S. at 72–73:

> * * * this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States * * * not to extend its borders to the furthest extent consonant with international law. [Footnote omitted.]

See, also, *California II, supra,* 381 U.S. at 167–169. The United States has not chosen to construct straight baselines within the island groups at issue, and the Special Master erred in doing so himself.

3. The Special Master's finding, if approved, would embarrass the United States in the conduct of its foreign affairs. The Special Master's use of baselines represents, in a small way, application of an archipelagic principle of enclosure which this nation currently opposes as a violation of international law. Certain island nations, particularly Indonesia and the Philippines, have drawn baselines connecting their outer islands and have claimed the seas thus enclosed as internal or "national" waters; the United States officially opposes such enclosures, because they significantly interfere with our national security and

commercial shipping interests. See Whiteman, *supra,* at 284–285.

The baselines drawn by the Special Master are of course much shorter than those claimed by the major island nations. But the archipelagic principle involved is similar, and its adoption by this Court could prejudice the United States' negotiating position concerning archipelagic regimes in the current Law of the Sea Conference beginning June 20, 1974. Since there are numerous areas around the world with coastal islands where such a principle could be applied by foreign nations, vital navigation and foreign policy interests are at stake.

CONCLUSION

For the foregoing reasons, this Court should determine that the area designated by the Special Master as Florida Bay is not a juridical bay and that the narrow waters within the lower Florida Keys, the Marquesas, and the Dry Tortugas are not enclosed as inland waters by means of straight baselines.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
WALLACE H. JOHNSON,
Assistant Attorney General.
KEITH A. JONES,
Assistant to the Solicitor General.
BRUCE C. RASHKOW,
MICHAEL W. REED,
Attorneys.

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